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EX PARTE OR LATE FILED

January 26, 2005

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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St. NW
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

Re: Clarification of the Commission's Rules and Policies Regarding
Unbundled Access to Incumbent Local Exchange Carriers' Inside
Wire Subloop
WC Docket No. 01-338
**Written Ex Parte Communication Notice of Stay in Related Federal
Court Proceeding**

Dear Ms. Dortch:

Cox Communications, Inc., by its attorneys and pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, hereby submits the attached Order of the United States District Court for the Western District of Oklahoma, issued on January 18, 2005, entering a stay in *Cox Oklahoma Telcom, L.L.C. v. Corporation Commission of the State of Oklahoma, et al.*¹ that will remain in effect until the Commission resolves the above-captioned proceeding.

As described in Cox's Petition for Declaratory Ruling (the "Petition") in this proceeding, *Cox v. OCC* challenges a ruling of the Oklahoma Corporation Commission (the "OCC") that prevents Cox from having direct access to inside wire subloops at incumbent LECs' terminal blocks in multi-tenant environments for the purpose of connecting new customers to Cox's network. Among other infirmities, the OCC based its ruling on a misinterpretation of the FCC's rules regarding competitive LECs' direct access rights. Accordingly, Cox initiated this proceeding for a declaratory ruling and, separately, requested that the federal district Court grant a stay to permit the Commission the opportunity to clarify the extent of competitive LECs' direct access rights as a matter of federal law and uniform national policy.

¹ No. CIV-04-1282-L (W.D. Okla. Filed Oct. 6, 2004) ("*Cox v. OCC*").

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The federal district Court entered the stay to ensure this result. In the Order, the Court recognized and deferred to the Commission's primary jurisdiction in this matter, concluding that "the precise issue of direct access to inside wire subloops in multiple tenant environments is currently pending before the FCC" and that a parallel court determination of the same issue would create a "real possibility . . . [of] . . . conflicting decisions."² The Court recognized that the clarification of the rights of competitive LECs to direct access was an issue for the Commission to decide, and it stayed the case pending the Commission's decision. The Court also noted that the OCC's order denying direct access remains in effect while *Cox v. OCC* remains pending.

As Cox and other parties have shown, the OCC's decision is incompatible with the Commission's previous orders and contributes to a body of conflicting rulings across the country. The Commission should act expeditiously to clarify the direct-access rules that must be applied not only in the pending Oklahoma court proceeding but on a national basis.

In accordance with Section 1.1206 of the Commission's rules, the original and one copy of this written *ex parte* communication are being filed with the Secretary's Office on this date.

Please contact the undersigned if the attached raises any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "David E. Mills". The signature is fluid and cursive, with a large initial "D" and "M".

David E. Mills

J.G. Harrington

Attachment

² Order at 4.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

COX OKLAHOMA TELECOM,)
L.L.C.,)

Plaintiff,)

v.)

No. CIV-04-1282-L

CORPORATION COMMISSION)
OF THE STATE OF OKLAHOMA,)
and SOUTHWESTERN BELL)
TELEPHONE, L.P., d/b/a SWBT)
OKLAHOMA,)

Defendants.)

ORDER

On November 5, 1999, the Federal Communications Commission ("FCC") issued an order declaring that incumbent local exchange carriers must make their inside wire subloops available to competitive local exchange carriers.¹ Inside wire subloops consist of a pair of wires that run from a terminal, which is typically mounted on the outside wall of a building, to the first telephone jack in the customer's office or apartment. The rates, terms, and conditions for a competitor's access to an incumbent's telecommunications network, including the inside wire subloops, are governed by interconnection agreements between the carriers. If the parties cannot negotiate an agreement, they may petition for arbitration before the

¹Defendant Southwestern Bell Telephone, L.P., d/b/a SBC Oklahoma ("SWBT") is an incumbent local exchange carrier; plaintiff, Cox Oklahoma Telecom, L.L.C. ("Cox"), is a competitive local exchange carrier.

relevant state commission. 47 U.S.C. § 252. Cox and SWBT entered into negotiated agreements in 1997 and 2002; neither agreement, however, included any provisions for the lease of inside wire subloops at multiple tenant environments.²

On March 24, 2003, Cox filed an application before the Oklahoma Corporation Commission ("OCC") requesting that the OCC arbitrate the subloop lease issue. *See In re Application of Cox Oklahoma Telcom, L.L.C. for Arbitration of Open Issues Concerning Unbundled Network Elements*, Report and Recommendation of the Arbitrator at 1 (April 2, 2004). Cox argued that it should be granted direct physical access to SWBT's inside wire subloops, which it defined as access to SWBT terminals by its technicians without the involvement of SWBT technicians. *Id.* at 45. After a hearing, the arbitrator issued a recommended decision denying Cox's request. *Id.* at 45-47. The OCC adopted the arbitrator's decision with minor modifications on June 28, 2004. *In re Application of Cox Oklahoma Telcom, L.L.C. for Arbitration of Open Issues Concerning Unbundled Network Elements*, Order No. 491645 (June 28, 2004).

On October 6, 2004, Cox filed this action seeking to overturn the OCC's decision. Shortly thereafter, Cox filed a petition before the FCC for a declaratory ruling on the direct-access issue. The same date, Cox filed a motion in this court to stay these proceedings based on the primary jurisdiction of the FCC. On November 4, 2004, the FCC issued a Public Notice seeking comments on Cox's petition; the

²Multiple tenant environments include multi-unit apartment and office buildings.

comment period closed on December 21, 2004. The court held a hearing on Cox's motion to stay on January 6, 2005. At the hearing, the comments received by the FCC were made part of the record and the court reviewed the comments before reaching its decision on the motion to stay.

The Court of Appeals for the Tenth Circuit spoke at length on the doctrine of primary jurisdiction in Williams Pipe Line Co. v. Empire Gas Corp., 76 F.3d 1491 (10th Cir. 1996).

"The doctrine of primary jurisdiction ... is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." In essence, the doctrine represents a determination that administrative agencies are better equipped than the courts to handle particular questions, and that referral of appropriate questions to an agency ensures desirable uniformity of results. Put more concretely,

The doctrine of primary jurisdiction allows a federal court to refer a matter extending beyond the "conventional experiences of judges" or "falling within the realm of administrative discretion" to an administrative agency with more specialized experience, expertise, and insight. Specifically, courts apply primary jurisdiction to cases involving technical and intricate questions of fact and policy that Congress has assigned to a specific agency.

The Supreme Court has clarified that the courts invoke the doctrine of primary jurisdiction when its twin purposes are served. The purposes of the doctrine are to: (1) ensure desirable uniformity in determinations of certain administrative questions, and (2) promote resort to agency experience and expertise where the court is presented with a question outside its conventional experience.

Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Thus, while the court is ultimately the appropriate body to declare a tariff practice void as against public policy, it should nonetheless refer the initial determination to the regulatory agency where it may benefit from the agency's expertise and insight, and to ensure uniformity. . . . On the other hand, the Court has made clear that there is no need "to refer the matter of construction to the [agency] if that body has already construed the particular tariff at issue or has clarified the factors underlying it." Whenever the doctrine applies, "the judicial process is suspended pending referral of such issues to the administrative body for its views."

Id., at 1496-97 (citations omitted).

Based on these standards, the court finds that a limited stay of this matter is warranted. While the parties vehemently dispute whether the OCC's ruling comports with prior FCC precedent,³ there is no doubt that the precise issue of direct access to inside wire subloops in multiple tenant environments is currently pending before the FCC. "There is therefore a real possibility that a decision by this court prior to the FCC's response to [Cox's] petition would result in conflicting decisions". Mical Communications, Inc. v. Sprint Telemedia, Inc., 1 F.3d 1031, 1040 (10th Cir. 1993).

³This dispute is not limited to this forum as the comments before the FCC attest.

As the OCC's decision remains in effect during the pendency of this appeal, none of the parties will be prejudiced by a limited stay to permit the FCC to rule on Cox's petition.

The Motion to Stay Based on Primary Jurisdiction of the Federal Communications Commission (Doc. No. 19) is GRANTED. This matter is STAYED until the FCC issues a dispositive ruling on Cox's October 27, 2004 Petition for Declaratory Ruling. Cox shall notify the court within **ten (10) days** of receipt of a decision from the FCC, at which point the court will lift the stay and set this matter for a scheduling conference.

It is so ordered this 18th day of January, 2005.

A handwritten signature in cursive script that reads "Tim Leonard". The signature is written in dark ink and is positioned above a horizontal line.

TIM LEONARD
United States District Judge